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09/851,456	05/08/2001	Stephen Paul Zimmerman	8074M	3630

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EXAMINER

BECKER, DREW E

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 06/11/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/851,456

Applicant(s)

ZIMMERMAN ET AL.

Examiner

Drew E Becker

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on 02 June 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☐ Claim(s) 1-18, 22 and 23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☐ Claim(s) 1-18, 22 and 23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_\_
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_ 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Response to Amendment***

1. The declaration filed on June 2, 2003 under 37 CFR 1.131 has been considered but is ineffective to overcome the McNeel et al and Bezek et al references.
2. The evidence submitted is insufficient to establish a conception of the invention prior to the effective date of the McNeel et al and Bezek et al references. While conception is the mental part of the inventive act, it must be capable of proof, such as by demonstrative evidence or by a complete disclosure to another. Conception is more than a vague idea of how to solve a problem. The requisite means themselves and their interaction must also be comprehended. See *Mergenthaler v. Scudder*, 1897 C.D. 724, 81 O.G. 1417 (D.C. Cir. 1897). The declaration provides evidence of a bowl-shaped snack piece, as illustrated in Exhibit B, but does not provide evidence for the claimed snack piece curved about single axis.

### ***Information Disclosure Statement***

3. The information disclosure statement filed October 1, 2001 fails to comply with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609 because the three "Sample" references do not include dates.

### ***Claim Rejections - 35 USC § 112***

4. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the

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art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

5. Claim 22 is rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claim 22 refers to an "engagement span". However, the specification does not describe what an engagement span is, or how it is calculated. Although an "engagement span" is mentioned on page 9, line 22 of the specification, it is not clear how it was calculated.

6. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

7. Claims 9, 14, 16 and 22 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

8. Claim 9 recites the limitation "said restricted end". There is insufficient antecedent basis for this limitation in the claim.

9. Claim 14 recites "said nested arrangement is consistent". It is not clear what type of arrangement would be considered "consistent".

10. Claim 16 recites the limitation "said restricted end". There is insufficient antecedent basis for this limitation in the claim.

11. Claim 22 recites an "engagement span". It is not clear what an "engagement span" is, or how it is calculated.

***Claim Rejections - 35 USC § 102***

12. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

13. Claims 1-4, 9, 12, 16-17, and 22 are rejected under 35 U.S.C. 102(b) as being anticipated by Hreschak [Des. 212,070].

Hreschak teaches a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides which are not parallel to the axis, restriction of movement to the sides and rear, an engagement span which is 90% of the vertical span, the axis being perpendicular to the open end, sidewalls, a restricted end which is less than 75% of the open end width, a vertical taper of less than 45°, and a varying radius of curvature along its length (Figures 1-4). The recitation "stackable" has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process

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steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Regardless, nearly any snack product, including Hreschak, would be capable of being stacked in some manner, for instance in a pile.

14. Claims 1-5, 8-9, 12-14, 17-18, and 22 are rejected under 35 U.S.C. 102(e) as being anticipated by McNeel et al [Pat. No. 6,412,397].

McNeel et al teach a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides which are not parallel to the axis, restriction of movement to the sides, an engagement span which is 90% of the vertical span, the axis being perpendicular to the open end, sidewalls, a vertical taper of less than 45°, an equilateral triangle shape, plural snack products stacked and nested in cans, and a segment of a right cone (Figure 10; column 9, lines 26-60).

### ***Claim Rejections - 35 USC § 103***

15. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

16. Claims 10-11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak.

Hreschak teaches the above mentioned components. Hreschak does not mention a length of 30-110mm, a radius of curvature of 15-500mm, or an open end width of 15-

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75mm. It would have been obvious to one of ordinary skill in the art to use these sizes in the snack product of Hreschak since snack chips, such as Doritos, Pringles, and Fritos; were commonly made in these sizes, since Hreschak simply does not mention a particular size, and since consumers preferred snack foods of this size as the snack foods fit into their hands more easily.

17. Claims 10-11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over McNeel et al.

McNeel et al teach the above mentioned components. McNeel et al do not mention a length of 30-110mm, a radius of curvature of 15-500mm, or an open end width of 15-75mm. It would have been obvious to one of ordinary skill in the art to use these sizes in the snack product of McNeel et al since snack chips, such as Doritos, Pringles, and Fritos; were commonly made in these sizes, since McNeel et al simply does not mention a particular size, and since consumers preferred snack foods of this size as the snack foods fit into their hands more easily.

18. Claims 5 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of McNeel et al.

Hreschak teaches the above mentioned components. Hreschak does not teach an equilateral triangle shape. McNeel et al teach a snack food with an equilateral triangle shape (Figure 10). It would have been obvious to one of ordinary skill in the art to incorporate the shape of McNeel et al into the snack product of Hreschak since both are directed to snack foods, since Hreschak already had a generally triangular shape

(Figure 1), and since an equilateral triangle shape was commonly used for snack food products as shown by McNeel et al (Figure 10).

19. Claims 5-7 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Blish [Des. 166,524].

Hreschak teaches the above mentioned components. Hreschak does not teach an isosceles triangle shape. Blish teaches a food product with a dip containment region and an isosceles triangle shape (Figures 1-3). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Blish into the food product of Hreschak since both are directed to scoop shaped foods, since Hreschak already had a generally triangular shape (Figure 1), and since an isosceles triangle shape was commonly used for snack food products as shown by Blish (Figures 1-3).

20. Claims 6-7 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over McNeel et al as applied above, in view of Blish [Des. 166,524].

McNeel et al teach the above mentioned components. McNeel et al do not teach an isosceles triangle shape. Blish teaches a food product with a dip containment region and an isosceles triangle shape (Figures 1-3). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Blish into the food product of McNeel et al since both are directed to scoop shaped foods, since McNeel et al already had a triangular shape (Figure 1), and since an isosceles triangle shape was commonly used for snack food products as shown by Blish (Figures 1-3).

21. Claims 13-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Bezek et al [Pat. No. 6,472,007].



Hreschak teaches the above mentioned components. Hreschak does not teach a nested arrangement. Bezek et al teach a snack food product in a nested arrangement (column 7, line 16). It would have been obvious to one of ordinary skill in the art to incorporate the nested arrangement of Bezek et al into the product of Hreschak since both are directed to snack food products, since Hreschak already had a consistent shape, and since snack foods were commonly placed in nested arrangements, as shown by Bezek et al (column 7, line 16), in order to reduce their overall volume and thus reduce shipping costs.

22. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Ipema [Des. 300,199].

Hreschak teaches the above mentioned components. Hreschak does not teach a segment of a right cone. Ipema teaches a scoop in the shape of a segment of a right cone (Figures 1-4). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Ipema into the product of Hreschak since both are directed to scooping products, since Hreschak already included sidewalls and a curved scoop region (Figures 1-4), and since scoops commonly had the shape of a segment of a right cone, as shown by Ipema (Figures 1-4).

23. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over McNeel et al as applied above, in view of Hreschak.

McNeel et al teach the above mentioned components. McNeel et al do not teach a restricted end width less than 75% the width of the open end. Hreschak teaches a food product with a restricted end width less than 75% the width of the open end (Figure 1-

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4). It would have been obvious to one of ordinary skill in the art to incorporate the features of Hreschak into the invention of McNeel et al since both are directed to snack food products, since McNeel et al already included sidewalls which restricted motion (Figure 10), and since the restricted end of Hreschak provided a means for preventing spillage of dip onto the users hand.

### ***Response to Arguments***

24. Applicant's arguments filed June 2, 2003 have been fully considered but they are not persuasive.

Applicant argues that Hreschak was not "stackable". The recitation "stackable" has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951). Regardless, nearly any snack product, including Hreschak, would be capable of being stacked in some manner. For instance, the snack products of Hreschak could have easily been stacked in a pile.

***Conclusion***

**25. THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 703-305-0300. The examiner can normally be reached on Monday-Thursday 8am-6pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

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Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1495.

A handwritten signature in black ink, appearing to read "Drew E. Becker", with a stylized flourish extending to the right.

Drew E Becker  
Examiner  
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June 11, 2003